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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,

3:95-CV-00757-HDM

11 Plaintiff,

12 and

ORDER

13 PYRAMID LAKE PAIUTE TRIBE OF
14 INDIANS,

15 Intervenor-Plaintiff,

16 v.

17 BOARD OF DIRECTORS OF THE
18 TRUCKEE-CARSON IRRIGATION
19 DISTRICT, individually and as
20 Representatives of the Class of
all Water Users in the Newlands
Reclamation Project; TRUCKEE-
CARSON IRRIGATION DISTRICT,

21 Defendants,

22 and

23 STATE OF NEVADA, Department of
Conservation and Natural
Resources, Division of Wildlife
24 and Division of State Lands;
CHURCHILL COUNTY; DODGE
25 BROTHERS AND DOGE JR. FAMILY
TRUST; DAVID P. HARRIGAN;
26 GEORGE AND SHELLY RAE
RAKURSHIN; WILLIAM D. AND
27 GWENDOLYN WASHBURN; MARVIN
WEISHAUP; HOWARD D. WOLF
28 FAMILY TRUST; RAY CONLAN;

1 CORKILL BROS., INC.; CALVIN R.
2 MOFFITT AND CANDACE J. MOFFITT;
3 BELL FAMILY TRUST; LARRY L.
4 FRITZ FAMILY TRUST; DAVID L.
5 MATLEY AND CHRISTINE L. MATLEY
6 FAMILY TRUST AND DAVID MATLEY;
7 HAROLD G. AND RHONDA JOHNSON
8 AND JOHNSON FAMILY TRUST; A&A
9 DAIRY; JOYCE LOHR; PERALDO
10 BROTHERS; STILLWATER FARMS,
11 INC.; CHARLES P. FREY, JR. AND
12 DEBRA S. FREY; NORMAN W. FREY;
13 FALLON-PAIUTE SHOSHONE TRIBE,

14 Intervenor-Defendants.
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16 On April 20, 2010, the Court of Appeals issued its decision
17 affirming this court's December 3, 2003, decision but vacating, in
18 relevant part, the court's calculation of the amount of excess
19 diversions subject to recoupment and remanding for recalculation
20 without regard to the confidence interval. In its mandate, the
21 Court of Appeals directed the court to recalculate the amount of
22 excess diversions subject to recoupment in the following years:
23 1974, 1975, 1978, and 1979.

24 On remand, the government and the Tribe argued that
25 recalculation of excess diversions without regard to the confidence
26 interval would result in four additional years having a measurable
27 amount of water subject to recoupment: 1973, 1976, 1985, and 1986.
28 This court, however, constrained by the mandate of the Court of
Appeals, limited recalculation of excess diversions to the four
specified years.

Following entry of the amended judgment, several of the
parties appealed. On July 22, 2013, the Court of Appeals issued an
order withdrawing its original mandate and amending it to include
recoupment for excess diversions in 1973, 1976, 1985, and 1986,

1 subject to this court's consideration of TCID's argument that an
2 alternative basis exists for denial of recoupment in 1985 and 1986.
3 This court's judgment on remand was vacated and this case was
4 remanded for proceedings in accordance with the amended mandate.
5 The amended mandate was issued on September 16, 2013, and this
6 court entered its order on mandate on September 23, 2013.
7 Accordingly, the court must now recalculate the total amount of
8 excess diversions and spills subject to recoupment.

9 In recalculating the amounts subject to recoupment, the court
10 employs the method used in its order of October 6, 2011, which
11 relied on the amounts subject to recoupment presented by defendant
12 TCID's expert Charles Binder at trial and summarized by the
13 government and Tribe's rebuttal expert Ali Shahroody on remand.
14 (See Doc. #734 (Shahroody Decl. Tr. Exs. 1805 & 1802; *id.* Ex. A)).
15 Neither the Court of Appeals nor any of the parties has disputed
16 the court's use of this method.

17 Therefore, as to the year 1973, the court concludes the total
18 amount subject to recoupment is 23,224 acre feet.

19 As to the year 1976, the court concludes the total amount
20 subject to recoupment is 3,204 acre feet.

21 As to the year 1985, the total amount subject to recoupment
22 would be 48,203 acre feet, and as to the year 1986, the total
23 amount subject to recoupment would be 9,918 acre feet. However, as
24 to both the years 1985 and 1986, the Court of Appeals has directed
25 the court to determine whether, and to what extent, the amounts
26 subject to recoupment are impacted by court orders authorizing
27 deviation from the OCAP. See *United States v. Bd. of Directors of*
28 *Truckee-Carson Irr. Dist.*, 723 F.3d 1029, 1035 (9th Cir. 2013).

1 On remand in 2011, TCID made two arguments in this regard.
2 (Doc. #744 at 8). First, TCID argued that court orders in 1985 and
3 1986 allowed diversions of water for storage. Specifically, TCID
4 argued that on January 15, 1985, Judge Craig issued an order
5 allowing diversions for the 1985 irrigation season, and that on
6 October 28, 1985, Judge Thompson continued that order. Second,
7 TCID argued that Judge Thompson's October 28, 1985, order also
8 provided that TCID's Bench/Bottom maps would be used during the
9 1986 irrigation season, and that measured by TCID's maps there were
10 no excess diversions for that year.

11 The government and the Tribe responded that beginning in March
12 1985, the Bureau of Reclamation ("Reclamation") issued several
13 interim OCAPs that controlled TCID's diversion of water in 1985 and
14 1986 and that Judge Thompson approved the 1985 interim OCAP in a
15 November 15, 1985, order. The government and Tribe also argued
16 that the OCAP approved by Judge Thompson on November 15, 1985,
17 which carried forward into 1986, employed Reclamation's maps.
18 Although Judge Thompson later rejected Reclamation's maps, they
19 argued, that decision was overturned on appeal.

20 The court has determined that additional briefing is necessary
21 to fully respond to the Ninth Circuit's Order of Remand.
22 Therefore, the parties shall address any orders in existence - if
23 there are any in addition to those already cited - that pertain to
24 the rights to use water in 1985 and 1986. The parties shall also
25 consider the impact of the following findings and conclusions of
26 this court's December 3, 2003, decision: (1) the OCAPs are
27 "subordinate to the Orr Ditch and Alpine Decrees . . . [and] any
28 orders or judgments issued pursuant to the Nevada District Court's

1 continuing jurisdiction in those cases necessarily would supercede
2 any inconsistent terms of the OCAP," (Doc. #423 at 10); (2) any
3 changes to the 1973 OCAP require either the Tribe's written
4 agreement or court approval, *id.* at 10, 14; and (3) "the evidence
5 [at trial] established that in 1985 and 1986 the decree court
6 entered orders with regard to diversions by the Federal Water
7 Master for water spreading and diversions in 1985 and 1986 that
8 take precedence over any interim OCAPs for those years and any
9 diversions or deliveries that occurred under court orders are not
10 properly a part of any recoupment calculation," *id.* at 25. In this
11 regard, the court notes that Judge Thompson's approval of the 1985
12 interim OCAP was from November 15, 1985, to March 15, 1986. (Doc.
13 #748 att. E (Minutes of the Court Dated Nov. 15, 1985)).

14 Further, as to TCID's second argument, Judge Thompson approved
15 the interim OCAP that adopted Reclamation's map for the 1986
16 irrigation season, (Doc. #748 Att. E (Tr. Ex. 43)) and Judge
17 Thompson's later order in a separate case rejecting Reclamation's
18 map was overturned on appeal in *United States v. Alpine Land &*
19 *Reservoir Co.*, 887 F.2d 207, 210 (9th Cir. 1989). While this may
20 suggest that it is Reclamation's map - and not TCID's - that
21 controls for the 1986 irrigation season, the parties shall address
22 these issues in the context of any and all other court orders in
23 existence that impact the right to use water in 1986.

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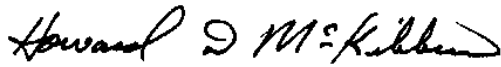
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1 In accordance with the foregoing, on or before March 3, 2014,
2 TCID shall file a brief with respect to its argument that court
3 orders authorized deviation from the OCAP in 1985 and 1986. The
4 plaintiffs shall file any opposition by April 3, 2014, and TCID
5 shall file any reply by April 18, 2014.

6 **IT IS SO ORDERED.**

7 DATED: This 29th day of January, 2014.

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10 UNITED STATES DISTRICT JUDGE
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